

STATE OF MICHIGAN  
COURT OF APPEALS

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In the Matter of CAMPBELL/METCALF, Minors.

UNPUBLISHED

August 21, 2014

No. 319946

Oakland Circuit Court

Family Division

LC No. 12-802524-NA

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Before: RIORDAN, P.J., and DONOFRIO and, BOONSTRA JJ.

PER CURIAM.

Respondent appeals as of right two orders terminating her parental rights over her minor children. For the reasons set forth below, we affirm.

I. REASONABLE EFFORTS TO REUNIFY

Respondent first argues that petitioner failed to demonstrate the reasonable efforts that it took to reunify respondent with the minor children. We disagree.

“Generally, an issue is not properly preserved if it is not raised before, addressed, or decided by the circuit court or administrative tribunal and need not be addressed if first raised on appeal.” *Loutts v Loutts*, 298 Mich App 21, 23; 826 NW2d 152 (2012) (quotation marks and emphasis omitted). Because respondent did not object at the trial court and raises the issue of petitioner’s reasonable efforts to return the minor children for the first time on appeal, this argument is not preserved for appellate review. “Review of an unpreserved error is limited to determining whether a plain error occurred that affected substantial rights.” *Rivette v Rose-Molina*, 278 Mich App 327, 328; 750 NW2d 603 (2008). Under this standard, relief may be granted if “(1) an error occurred (2) that was clear or obvious and (3) prejudiced the party, meaning it affected the outcome of the lower court proceedings.” *Duray Dev, LLC v Perrin*, 288 Mich App 143, 150; 792 NW2d 749 (2010).

Generally, petitioner is required to undertake “[r]easonable efforts to reunify the child and family.” MCL 712A.19a(2); see also *In re Frey*, 297 Mich App 242, 247; 824 NW2d 569 (2012). However, reasonable efforts are not required when there has been a “judicial determination that the parent has subjected the child to aggravated circumstances as provided in . . . MCL 722.638.” MCL 712A.19a(2)(a); see also *In re Rood*, 483 Mich 73, 100 n 37; 763 NW2d 587 (2009). Two such circumstances are the parent’s cause, or creation of an unreasonable risk, of “[b]attering, torture, or other severe physical abuse,” MCL 722.638(1)(a)(iii), or “[l]ife threatening injur[ies],” MCL 722.638(1)(a)(v).

In its opinion and order explaining its exercise of jurisdiction over EC, the trial court found that “the material allegations in the petition have been proven by a preponderance of evidence” and that EC “was injured in multiple ways while in the care of [respondent] or someone authorized by [respondent] to care for [EC].” Specifically, the bruises on EC’s eye appeared “prior to the emergency room visit and should have alerted [respondent] to the risks posed by contact between [EC] and” respondent’s then-boyfriend, Metcalf, and the court found that respondent “caused [EC] to suffer seizures by her failure to properly prepare her formula.”

Thus, the court implicitly determined that respondent “subjected the child to aggravated circumstances as provided in . . . MCL 722.638,” and petitioner, pursuant to MCL 712A.19a(2)(a), was not obligated to demonstrate that it undertook reasonable efforts to reunite respondent with EC. The same result holds with respect to KM, as all of the possible aggravated circumstances concern abuse of “the child or a sibling of the child.” MCL 722.638(1)(a). As a result, respondent has not established the presence of any plain error.

## II. STATUTORY GROUNDS

Respondent next argues that the trial court clearly erred when it found that statutory grounds existed to terminate respondent’s parental rights over the minor children. We disagree.

This Court reviews the trial court’s findings that statutory grounds for termination have been established for clear error. MCR 3.977(K); *In re Rood*, 483 Mich at 90-91. A finding is clearly erroneous if, despite evidence to support the finding, the reviewing Court is left with the definite and firm conviction that a mistake has been made. *In re Rood*, 483 Mich at 91.

If the trial court finds that one or more statutory grounds exist for termination of parental rights and that termination of parental rights is in the children’s best interests, the court must order that the respondent’s parental rights be terminated and that additional efforts for reunification of the children and parent not be made. MCL 712A.19b(5); MCR 3.977(E); *In re Beck*, 488 Mich 6, 11; 793 NW2d 562 (2010). The statutory bases for termination of parental rights must be substantiated by clear and convincing evidence. MCR 3.977(E)(3); *In re Hudson*, 294 Mich App 261, 264; 817 NW2d 115 (2011). Even if the court erroneously found sufficient evidence under one or more statutory grounds, termination is appropriate if only one statutory ground is established by clear and convincing evidence. *In re Ellis*, 294 Mich App 30, 33; 817 NW2d 111 (2011).

The court found that termination of respondent’s parental rights over EC was justified under MCL 712A.19b(3)(b)(i) (parent’s act caused physical injury or abuse), (b)(ii) (parent who had opportunity to prevent injury or abuse failed to do so), (g) (without regard to intent, failed to provide proper care or custody), (j) (reasonable likelihood of harm to child if returned to parent), (k)(i) (abused child or sibling and abuse included abandonment), and (k)(iii) (abused child or sibling and abuse included battering, torture, or other severe physical abuse). The court also found that termination of respondent’s rights over KM was justified under MCL 712A.19b(3)(b)(i) (parent’s act caused physical injury or abuse), (b)(ii) (parent who had opportunity to prevent injury or abuse failed to do so), (g) (without regard to intent, failed to provide proper care or custody), and (j) (reasonable likelihood of harm to child if returned to parent).

MCL 712A.19b(3)(b)(i) and (ii)

MCL 712A.19b(3)(b) provides for termination of a parent's parental rights if

[t]he child or a sibling of the child has suffered physical injury or physical or sexual abuse under [one] or more of the following circumstances:

(i) The parent's act caused the physical injury or physical or sexual abuse and the court finds that there is a reasonable likelihood that the child will suffer from injury or abuse in the foreseeable future if placed in the parent's home.

(ii) The parent who had the opportunity to prevent the physical injury or physical or sexual abuse failed to do so and the court finds that there is a reasonable likelihood that the child will suffer injury or abuse in the foreseeable future if placed in the parent's home.

Respondent argues that petitioner "did not sufficiently prove that [respondent] caused [EC] the physical injury alleged." However, the portion of the trial court's opinion dedicated to MCL 712A.19b(3)(b)(i) concerned not the injuries allegedly inflicted by respondent's boyfriend Metcalf but, instead, EC's seizure, which evidence suggested was caused by a dangerously low blood-sodium level. Respondent told Mary Lu Angelilli, a child-abuse pediatrician, that she gave EC six ounces of water mixed with Karo syrup daily and told Dawn Uncapher, a Child Protective Services ("CPS") investigator, that she attributed EC's seizure to "too much water intake." Angelilli opined that the low blood-sodium level resulted from EC having consumed too much water and that the dilution of the formula with water, contrary to the instructions on the packaging, constituted neglect or abuse because "any mother in any generation" would have known that the amount of water it would have taken to cause a blood-sodium level as low as EC's "was too much water." Notably, MCL 712A.19b(3)(b)(i) does not require a finding of fault. This subsection was satisfied with respect to both children because respondent admitted that she caused EC "physical injury," and the trial court found, "[b]ased on the medical evidence presented and the incredible testimony" of respondent, that "there is a reasonable likelihood that both children will suffer from injury or abuse in the foreseeable future if placed" with respondent. MCL 712A.19b(3)(b)(i).

Respondent argues, with respect to MCL 712A.19b(3)(b)(ii), that there was "insufficient evidence that . . . [respondent] knew or should have known the source of [EC's] injuries." The trial court dismissed respondent's "multitude of explanations for the injuries to" EC and found, based on respondent's testimony and "her inability to take responsibility for the bite marks, bruises, eye injury and rib fractures," that respondent "had the ability to prevent the injuries and did not protect [EC] and there is a reasonable likelihood that [EC] and [KM] will suffer injury or abuse in the foreseeable future if placed" with respondent. Respondent cites no evidence in support of her implication that she lacked the ability to prevent EC's injuries. Far from absolving her of responsibility, respondent's proclaimed ignorance of the source of EC's injuries only supports the trial court's conclusion that the minor children are at risk of harm in respondent's care, given the evidence that respondent was EC's primary caretaker. Whether respondent concealed or is genuinely ignorant of the origin of EC's serious injuries need not

have been resolved; either explanation supports termination of respondent's parental rights to the minor children under MCL 712A.19b(3)(b)(ii).

#### MCL 712A.19b(3)(g)

MCL 712A.19b(3)(g) provides for termination of a parent's parental rights where "[t]he parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age." Citing respondent's "failure to acknowledge and address the serious physical abuse suffered by" EC, the trial court found that respondent, "without regard to intent, has failed to provide proper care or custody for the child and there is no reasonable expectation that [respondent] will be able to provide proper care and custody within a reasonable time considering the child's age."<sup>1</sup>

Without justification, respondent continues to fixate on the origin of EC's injuries, arguing that this statutory ground was inadequately proven because the record evidence "did not clearly establish the source of the injury to" EC and "did not firmly establish how [respondent] should have known about the injuries to" EC. However, this subsection unambiguously applies to the failure to proper care and custody without regard to the parent's intent. MCL 712A.19b(3)(g). Angelilli testified that EC sustained six rib fractures, two bruises on her left eyelid, and bite marks on her thigh, buttock, lower leg, and arm that Angelilli opined were created by an adult or adolescent person. The seizure that may have saved EC's life by causing respondent to visit an emergency room was caused by a blood-sodium level that Angelilli said was "low enough to cause seizures" and was the likely result of the dilution of EC's formula. Respondent admitted that she watered down the formula on the advice of friends and relatives and "regret[ed] listening to other people" instead of "thoroughly reading the label on the liquid formula."

Further, respondent's inconsistent explanations suggest that she does not take responsibility for, or acknowledge the severity and seriousness of, EC's abuse. For example, after first denying having ever seen the bite marks because of either poor lighting or poor vision, respondent told Raven Ross, the foster-care worker assigned to KM, that she did not know how the marks were made, but "figured that [Metcalf] . . . may have done it"; in another conversation, she speculated that Antionette Claxton, who cared for respondent's mother and also lived in the same house, had abused EC because Claxton "was the person who first observed the marks on" EC. Given the gravity of the abuse EC sustained at a very early age and respondent's lack of concern or urgency for EC's injuries, the trial court did not clearly err in finding that there was "no reasonable expectation that [respondent would] be able to provide proper care and custody within a reasonable time considering" EC's and KM's ages. MCL 712A.19b(3)(g).

#### MCL 712A.19b(3)(j)

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<sup>1</sup> The trial court's use of the singular "child" derives from the statutory language, MCL 712A.19b(3)(g). The court found that this subsection applied to both EC and KM.

MCL 712A.19b(3)(j) provides for termination of a parent's parental rights where "[t]here is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent." The trial court found that it was reasonably likely that the minor children would be harmed if returned to respondent's care based on respondent's "failure to take responsibility for the injuries to [EC], her lack of concern for the abuse, and her multiple inexplicable reasons for the injuries to" EC. Respondent argues that she has no criminal record or CPS history and "was never cited as the person responsible for the injuries to" EC.

As EC's primary caretaker, respondent was *solely* responsible for EC's care. Respondent told Uncapher that "she kn[ew]" that a bruise on EC's eyelid occurred on the day Metcalf took her with him to a grocery store. Respondent revealed that she had "suspicions" that Metcalf was abusing EC and that she "had several discussions with him about that" but did not limit Metcalf's access to her. However, Edlena Tatum, the foster-care worker assigned to EC, learned from the foster parents that, while respondent testified that she ended her romantic relationship with Metcalf in October 2012 and that she had no contact with him, Metcalf had driven respondent to a visit with EC as recently as "[a]bout a month" before the dispositional hearing and that respondent and Metcalf attempted to conceal that fact by having respondent walk up to the house "as if she had caught the bus." When Ross confronted respondent with evidence that she had been seen with Metcalf, she admitted that Metcalf "has been bringing her to parenting time and court hearings." As recently as two weeks before the dispositional hearing, KM's foster parents reported having seen respondent dropped off by the same car Ross saw Metcalf driving.

Respondent's demonstrated intent to hide Metcalf from foster-care workers and KM's foster parents signals, at best, her suspicion that he abused EC, and at worst, her knowledge of it. In any case, respondent's behavior augurs poorly for the safety of the minor children in her home. Accordingly, the trial court did not clearly err when it found that termination of respondent's parental rights over the minor children was justified under MCL 712A.19b(3)(j).

#### MCL 712A.19b(3)(k)(i) and (iii)

With respect to EC only, the trial court found that clear and convincing evidence supported the termination of respondent's parental rights under MCL 712A.19b(3)(k)(i)<sup>2</sup> and (k)(iii).

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<sup>2</sup> MCL 712A.19b(3)(k)(i) provides for termination of a parent's parental rights if the parent abused the child or a sibling of the child and the abuse included "[a]bandonment of a young child." Although the conclusion of the statutory-grounds section of the trial court's opinion and order provided that grounds existed for terminating respondent's parental rights over EC under MCL 712A.19b(3)(k)(i), the opinion contains no analysis of that subsection with the exception of the sentence, "The court does not find any evidence to support this factor as to the minor child [EC]." Thus, it is apparent that it was a clerical error to include this ground in the conclusion, and we will not address this subsection because there is no evidence of abandonment in the record. We note that even if the trial court erroneously did terminate respondent's parental rights

MCL 712A.19b(3)(k)(iii) provides for the termination of a parent's parental rights if the parent abused the child or a sibling of the child and the abuse included "[b]attering, torture, or other severe physical abuse." The court found that respondent "knew or should have known about the physical injuries [to EC] due to the outward manifestation and appearance of injuries on the child" and that respondent "physically injured [EC] by watering down her formula." While knowledge of or acquiescence in physical abuse may justify termination of parental rights under other subsections, see MCL 712A.19b(3)(b)(ii), they are not material to the analysis of MCL 712A.19b(3)(k)(iii). However, the undisputed evidence that respondent diluted EC's formula, causing her to have a seizure because her blood-sodium level became dangerously low, is relevant to this subsection. While respondent's behavior did not constitute battering or torture, it did constitute "severe physical abuse" as those words are commonly understood. "An undefined statutory term must be accorded its plain and ordinary meaning." *Brckett v Focus Hope, Inc*, 482 Mich 269, 276; 753 NW2d 207 (2008). "A lay dictionary may be consulted to define a common word or phrase that lacks a unique legal meaning." *Id.* "Abuse" means "to treat in a harmful or injurious way," and "severe" means "grave; critical." *Random House Webster's College Dictionary* (1997). Angelilli testified that EC's blood-sodium level was "low enough to cause seizures" and the result of the consumption of water in an amount high enough to constitute abuse. Accordingly, we are not left with a definite and firm conviction that the trial court erred in finding that this statutory ground was proven by clear and convincing evidence.

### III. BEST INTERESTS

Respondent next argues that the trial court clearly erred when it found that termination of respondent's parental rights was in the best interests of the minor children. We disagree. We review a trial court's findings regarding the best interests of the children for clear error. MCR 3.977(K); *In re Rood*, 483 Mich at 90-91.

Once a statutory ground for termination is established, the trial court must determine whether termination is in the best interests of the child. MCL 712A.19b(5); *In re HRC*, 286 Mich App 444, 452-453; 781 NW2d 105 (2009). To make that determination, "the court may consider the child's bond to the parent, the parent's parenting ability, the child's need for permanency, stability, and finality, and the advantages of a foster home over the parent's home." *In re Olive/Metts*, 297 Mich App 35, 41-42; 823 NW2d 144 (2012) (citations omitted). The fact that a child is placed with a relative weighs against termination. *Id.* at 42-43. "[T]he preponderance of the evidence standard applies to the best-interests determination." *In re Moss*, 301 Mich App 76, 90; 836 NW2d 182 (2013).

The trial court found, "[g]iving equal weight to all factors and careful consideration to the testimony and evidence presented," and based on "the age of the children, the current placement of the children, and the circumstances surrounding the children," that termination of respondent's parental rights was in the best interests of EC and KM. The trial court relied heavily on the testimony of Kathy Spatafora, a court-appointed psychologist who examined respondent. Spatafora opined that respondent minimized the allegations of abuse against EC because

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on this basis, reversal would not be required because, as discussed, other statutory grounds exist to support termination. *In re Ellis*, 294 Mich App at 33.

respondent needed “to present everything as okay and [had] a need to deny common faults.” She further stated that it was “not likely that [respondent] would be able to care for the children” due to her need to maintain her romantic relationships and that respondent would require “intense and long-term” treatment in order to progress.

Respondent argues that the best-interests factors in the Child Custody Act, MCL 722.23, weigh against termination of her parental rights. However, where the termination of parental rights is sought, the trial court “is not bound to make findings with regard to the best interests factors of the Child Custody Act, [MCL 722.23].” *In re JS & SM*, 231 Mich App 92, 102; 585 NW2d 326 (1998), overruled in part on other grounds by *In re Trejo*, 462 Mich 341, 353; 612 NW2d 407 (2000). Thus, although “it is perfectly appropriate” for the court “to refer directly to pertinent best interests factors” in child-protection cases, a court is not required to do so. *In re JS & SM*, 231 Mich App at 102-103.

Spatafora’s testimony, and the trial court’s reliance thereon, was supported by the record. Respondent provided inconsistent, implausible explanations for EC’s serious injuries and denied associating with Metcalf, EC’s suspected abuser, despite evidence to the contrary. Respondent is correct that a child’s placement with a relative militates against termination. *In re Olive/Metts*, 297 Mich App at 42-43. However, the other *Olive/Metts* factors supported termination. While EC’s foster-care worker suggested that EC had bonded with respondent, respondent’s acts and omissions left doubts about her parenting ability, and EC’s “need for permanency, stability, and finality,” *id.* at 41-42, were at a maximum considering her young age. Further, KM, who was born while this case was pending, seemed not to have bonded with respondent, as he frequently cried during her visits, and his need for permanency, stability, and finality are better met with his foster family. Accordingly, we are not left with a definite and firm conviction that the trial court erred in its best interests determinations.

Affirmed.

/s/Michael J. Riordan

/s/ Pat M. Donofrio

/s/ Mark T. Boonstra